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NOV 7 1958
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No. 232

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

FRANK H. HILLS, ET AL.,
Petitioners,

v.

COLONEL EISENHART, ET AL.,
Respondents.

Application for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR REHEARING

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PETITION FOR REHEARING ON THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioners, Frank H. Hills, et al, file this petition for a rehearing in the matter of the petition for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit. The petition for the writ of certiorari was denied on October 13, 1958, and this petition for rehearing is filed within twenty-five days thereafter in accordance with rule 58 of this Honorable Court.

REASONS FOR THE REHEARING

This petition for rehearing is filed because of the tremendous importance of this case to all of the thousands of civil service employees now employed by the Department

of Defense in the various bases throughout the United States. If the intention of the Respondents prevail, it will amount to a complete destruction of the civil service system as far as it relates to employment at the various bases under the control of the Department of Defense.

Counsel for the petitioners believe that they have not brought out sharply enough to the attention of this Court the real situation that arises by the facts in this case.

In plain language, the commissioned officials of the Air Forces are demoting long time permanent civil service employees, and replacing the positions held by Commissioned Officers. If this right can at once be established, then we may reasonably expect that non-commissioned and even privates of the Air Forces will replace civilian employees of the lower grades.

This is plainly what is contemplated, and any such situation is clearly contrary to the public policy of this country which Congress definitely established by the Civil Service System.

The Solicitor General instead of opposing the granting of the writ of certiorari in this case should have, in view of the historical background in establishing the civil service system, prayed that the writ be granted in order to stop at the fountain head the attempt of the officials to turn this country into a military organization.

In the case of Stark v Wickard, 321 U.S. 288, this Court stated that the right to judicial determination of the Appellants' rights is found in the existence of the Courts. In plain words, it is the duty of the Courts to protect the petitioners' rights as civil service employees of the United States.

Attention is also directed to your decision in the case of Harmon v Brucker, Secretary of the Department of the Army, —— U.S. ——, 2 L. Ed. 2d 503, decided by this

Court on March 3, 1958. That case involved the review of the petitioner's discharge from military service. Among other things, this Court in its opinion said:

> "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers."

This Court cited the following cases in support of this view:

> American School of Magnetic Healing v McAnnulty, 187 US 94, 108, 47 L.Ed. 90, 96, 23 S Ct 33
> Philadelphia Co. v Stimson, 223 US 605, 621, 622, 56 L.Ed. 570, 577, 578, 32 S Ct 340
> Stark v Wickard, 321 U.S. 288, 310, 88 L.Ed. 733, 748, 64 S Ct 559

This Court further held that the District Court has not only jurisdiction to determine its jurisdiction but also power to construe the statutes involved to determine whether the respondent did exceed his powers.

The foregoing language quoted from this court's opinion in Harmon v Brucker, supra, would seem to have given the District Court in California in this case full, adequate and complete jurisdiction over the subject matter of the litigation and the parties to the action for the reason that it is clear that the petitioners had no right of appeal to the Civil Service Commission.

CONCLUSION

For the reasons herein stated the petitioners pray that the order of October 13, 1958 denying the petition for the writ of certiorari in this cause be set aside and that this court issue a writ of certiorari to the U. S. Court of Appeals for the 9th Circuit and upon a review the judgment of the said Court of Appeals be in all things reversed and this cause remanded to that court in accordance with the views of this Court.

Respectfully submitted,

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Certificate of Counsel

I, Claude L. Dawson, attorney for the petitioners do hereby certify that this petition for rehearing in this cause is made in good faith and not for the purpose of delay.

I further certify that it is restricted to grounds which are intervening substantial grounds not previously stated in the original petition for certiorari.

Claude L. Dawson
Attorney for the Petitioners